IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SECOND APPEAL No 300 of 1986

For Approval and Signature:

Hon'ble MR.JUSTICE J.M.PANCHAL

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1. Whether Reporters of Local Papers may be allowed to see the judgements?

2. To be referred to the Reporter or not?

3. Whether Their Lordships wish to see the fair copy of the judgement?

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder?

5. Whether it is to be circulated to the Civil Judge?

BHAGIRATH RAMBHAI PARMAR

Versus

STATE OF GUJARAT

Appearance:

MR NAGIN N GANDHI for appellant

Miss K.N.Valikarimwala, A.G.P.for Respondents.

CORAM : MR.JUSTICE J.M.PANCHAL

Date of decision: 14/03/97

ORAL JUDGEMENT

1. This Second Appeal has arisen from the suit brought by the appellant against the State of Gujarat and others for a declaration that order dated March 25, 1983, terminating his services is illegal, void ab initio and ultra vires.

2. While admitting the Second Appeal, the court (Coram : J.P.Desai, J.) formulated following

substantial question of law :

" Whether the order at Exh.28 removing the appellant from service is illegal, ultra vires and null and void on the ground that without holding any inquiry the order is passed and, therefore, hit by Article 311 (2) of the Constitution of India ?"

The abovereferred to substantial question of law arises for consideration of the court in the back ground of following facts.

The appellant was selected as Armed Constable by Commandant, State Reserve Police Force, Group-11, Vav, vide order dated December 21, 1981, pursuant to certificate issued by Civil Surgeon which indicated that the appellant had necessary qualifications relating to physical standards prescribed under Constables (Armed Branch, Unarmed Branch and Women Branch) Recruitment Rules, 1979. It may be stated that in exercise of the powers conferred by Clause (b) of Section 5 of the Bombay Police Act, 1951, the Government of Gujarat has made rules known as Constables (Armed Branch, Unarmed Branch and Women Branch) Recruitment Rules, 1979, ('the Rules' for short) for regulating recruitment to the post of Constables (Armed Branch, Unarmed Branch and Women Branch) in the Gujarat Subordinate Services, Class-III in the Police Department. Rule 5 of the Rules provides that the selected candidate shall be on a probation for a period of two years whereas as per rule 6 of the Rules, the selected candidate has to undergo such training as may be prescribed by the Government from time to time. The order of appointment which is produced by the appellant in the case at Exh.27 clearly shows that the selection of the appellant as armed constable was on temporary basis and his services were liable to be terminated without notice or assigning any reason. The record shows that after selection, the plaintiff was sent for training to be undergone for a period 9 months, but he could not complete the training successfully during the said period of 9 months. Therefore, period of training was extended by 5 months in his case and he was directed to undergo training for a further period of 5 months. During surprise checking, it was found by the Principal, Junagadh Training School that the appellant was absent on May 18, 1982, for which punishment of extra drill for 7 days was imposed on the plaintiff. It was again noticed that the appellant had deserted from training for a period of 17 days from May 21, 1982 to June 7, 1982. Therefore, the said period was treated as

leave without pay and punishment of extra drill for seven days was again imposed. On March 23, 1982, the appellant was found absent in extra drill and therefore, he was directed to undergo further extra drill for a period of 3 days. Again on October 22, 1982, during checking, the appellant was found absent for which he was directed to undergo extra drill for a period of 7 days. The appellant did not attend morning parade on December 24, 1982 and therefore, punishment of undergoing extra drill for a period of 7 days was imposed. Again on January 13, 1983, the appellant did not attend morning parade. The result was that the absence was treated as leave without pay and he was directed to undergo extra drill for a period of 7 days. On January 28, 1983, after attending 2 periods, the appellant left the ground leaving rifle entrusted to him unattended in the barrack. The appellant again deserted from training for a period from January 31, 1983 to February 7, 1983. In view of this unsatisfactory performance of the appellant, necessary report was submitted by Principal, Police Training School to Commandant, State Reserve Police Force, Group-11, Vav. On consideration of the report, the commandant was of the view that the appellant failed to complete training satisfactorily which was required to be imparted to him and was thus unsuitable for service. In view of the said conclusion, the Commandant terminated the services of the appellant with effect from March 8, 1983, by order dated March 25, 1983. Thereupon after serving notice under Section 80 of the Code of Civil Procedure, 1908, the appellant instituted Regular Civil Suit No.166 of 1984, in the court of learned Civil Judge (S.D.), Bhavnagar, and sought declaration that the order terminating his services was illegal, null and void ab initio. The appellant also prayed to direct the respondents to reinstate him in service with back wages and other consequential benefits.

3. The respondents contested the suit by filing written statement at Exh.9 . In the written statement, it was averred that notice served on respondents under Section 80 of the Code of Civil Procedure was illegal and therefore, the suit was not maintainable. It was pleaded that the appellant was not found suitable for serving as Armed Constable and as his services were terminated on the ground of unsuitability, the suit was liable to be dismissed. It was asserted in the written statement that the plaintiff having not completed the training satisfactorily was not entitled to the reliefs claimed in the plaint.

4. The trial court framed 2 issues for

determination. In order to prove his case, the plaintiff examined himself at Exh.11. The respondents examined 1) Mr. A.C.Amdawadi who was serving as Office Suprintendent, S.R.P. Group No.11, Vav at Exh.19, (2) Raghunath Madhavrav Kadam, Assistant Commandant of S.R.P., S.R.P. Group -11, Vav at Exh 26 and (3) Janardan Hiralal Dave at Exh.31 who was at the relevant time serving at S.R.P. Training School, Junagadh to prove the case pleaded in the written statement.

5. On appreciation of documentary and oral evidence led by the parties, the trial court concluded that order terminating services of the plaintiff was passed by way of punishment without following provisions of Article 311 (2) of the Constitution of India. In that view of the matter, the trial court decreed the suit by judgment and order dated October 29, 1985.

6. Feeling aggrieved by the abovereferred to decree, the respondents preferred Regular Civil Appeal No.82 of 1986 in the District Court at Bhavnagar. On consideration of the material, the learned District Judge found that the services of the appellant were not terminated on the ground of any mis-conduct, but his services were dispensed with as he had not completed the training satisfactorily. In this view of the conclusion, the learned District Judge allowed the appeal by judgment and order dated October 20, 1986 giving rise to the present appeal.

7. Mr. Nilesh Pandya, learned counsel for the appellant submitted that order at Exh.28 clearly indicates that the appellant was removed from service by way of punishment and as opportunity of being heard was not given to the appellant, the appeal should be accepted by restoring decree passed by the trial court. It was pleaded that no sufficient opportunity was given to the appellant to undergo training contemplated by the Rules and therefore, the decree passed by the trial court in favour of the appellant should not have been reversed by the first appellate court. Miss K.N.Valikarimwala, learned counsel for the respondents argued that as services of the appellant were dispensed with on ground of unsuitability, the appeal should be dismissed.

8. In my view, there is no substance in any of the contention raised on behalf of the appellant and the Second Appeal is liable to be dismissed. From the judgment rendered by the first appellate court which is final court of fact, it is evident that the appellant had not undergone the training contemplated by the Rules

satisfactorily. Initially the appellant was required to undergo training for a period of 9 months, but as he could not undergo the training satisfactorily, the period was extended by 5 months in his case. Even during the said extended period, the plaintiff did not attend the training regularly and used to remain absent without any cogent reasons and without informing his superiors. Thereupon necessary reports were made from time to time by Principal of the Training School to the Commandant. Under these circumstances, the Commandant terminated services of the appellant by order dated March 25, 1983.

9. By catena of decisions of the Supreme Court, the law relating to termination of services of a temporary government servant is well established. A temporary government servant has no right to hold the post. Whenever, the competent authority is satisfied that the work and conduct of a temporary servant is not satisfactory or that his continuance in service is not in public interest on account of his unsuitability, misconduct or inefficiency, it may either terminate his services in accordance with the terms and conditions of the service or the relevant rules or it may decide to take punitive action against the temporary government servant. If the services of a temporary government servant is terminated in accordance with the terms and conditions of service, it will not visit him with any evil consequences. If on the perusal of the character roll entries or on the basis of preliminary inquiry on the allegations made against an employee, the competent authority is satisfied that the employee is not suitable for the service whereupon the services of the temporary employee are terminated, no exception can be taken to such an order of termination. Before terminating the services of a temporary servant or reverting the person officiating in a higher post to his substantive post, the government may hold a preliminary enquiry to form the requisite satisfaction for the continuance of the employee in service or officiating government servant as the case may be. Such an inquiry does not change the nature of the order of the termination or reversion. If, however, it is decided to take punitive action the competent authority may hold a formal inquiry by framing charges and giving opportunity to the government servant in accordance with Article 311 (2) which is applicable to temporary government servants also. (See (1) State of of Uttar Pradesh and another v. Kaushal Kishore Shukla (1991) 1 SCC 691, (2). Triveni Shankar Saxena v. State of U.P. and others, A.I.R. 1992 Supreme Court, 496, (3) State of U.P. and another v. Prem Lata Misra (Km.) and others (1994) 4 SCC, 189, (4) G.B.Pant Agricultural &

& Technology University v Kesho Ram (1994) 4 SCC, 437, (5) Madhya Pradesh Hasta Shilpa Vikas Nigam v. Devendra Kumar Jain and others (1995) 1 SCC 638 and (6) State of U.P. and others v. Kamaladevi (Smt.) and another (1996) 4 SCC, 548.)

It is true that the court can lift veil of innocuous order to find whether it is the foundation or motive to pass the final order. If mis-conduct is foundation to pass order, then inquiry into misconduct should be conducted and an action in accordance with law should follow. But if it is motive then it is not incumbent upon the competent officer to have the inquiry conducted and services of temporary employee could be terminated in terms of order of appointment or rules. On appreciation of evidence, the first appellate court has rightly come to the conclusion that the order of termination has not been passed by way of punishment. As the petitioner did not complete training satisfactorily, he was found unsuitable for services. The references to absence of the plaintiff during training or imposition of different punishments in the order of removal cannot be construed as mis-conduct being the foundation of the order of termination of services. The first appellate court has correctly concluded that the reference to those facts is motive for passing the order of removal and therefore, it was not incumbent upon the competent officer to have the inquiry conducted before terminating services of the appellant. It may be mentioned that as per the Rules, after successful training, the selected candidate has to pass departmental examination as well as examination in Hindi and Gujarati. It is an admitted position that as the plaintiff could not complete the training satisfactorily, he had no opportunity to pass departmental examination at all. Therefore, the trial court could not have decreed the suit in favour of the plaintiff ignoring statutory requirements mentioned in the Rules. In fact direction given by the Trial Court tantamounts to nullifying statutory rules which is not permissible to a Civil Court while exercising powers under Section 9 of the Code of Civil Procedure. Therefore, it cannot be said that any error is committed by the first appellate court in reversing decree passed by the trial court. On the facts and in the circumstances of the case, I am of the view that as the appellant was not removed from service by way of misconduct, it was not necessary for the respondents to follow the procedure contemplated by Article 311 (2) of the Constitution of India. Therefore, the substantial question of law formulated by the court is answered in negative and against the appellant.

10. In view of the above discussion, I do not find any substance in the Second Appeal. The Second Appeal therefore, fails and is dismissed. However, having regard to the facts of the case, there shall be no order as to cost.

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